

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C" MUMBAI
BEFORE SHRI RAJESH KUMAR (ACCOUNTANT MEMBER) AND
SHRI RAVISH SOOD (JUDICIAL MEMBER)**

**ITA No. 1524/MUM/2017
(Assessment Year: 2009-10)**

Chandra Financial Services Pvt. Ltd., Achal Building, 3 rd Floor, 21, Mody Street, Fort, Mumbai – 400 001	Vs. Assistant Commissioner of Income Tax-2(1)(1), Mumbai
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PAN No. AABFA1353R

(Assessee)

(Revenue)

Assessee by	: Shri Neelkanth Khandelwal, A.R
Revenue by	: Shri R.K. Sahu, D.R

Date of Hearing	: 24/08/2021
Date of pronouncement	: 18/11/2021

ORDER

PER RAVISH SOOD, J.M:

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-4, Mumbai, dated 03.01.2017, which in turn arises from the order passed by the A.O u/s 144 r.w.s 147 of the Income Tax Act, 1961 (for short 'Act') dated 20.03.2015 for A.Y. 2009-10. The assessee has assailed the impugned order on the following grounds before us:

"The Assistant Commissioner of Income-tax 2(1)(1), Mumbai (hereinafter referred to as the Assessing Officer) erred in issuing notice under section 148 of the Act.

1. The appellants contend that on the facts and in the circumstances of the case and in law the notice issued under section 148 is bad in law and consequently, the assessment needs to be quashed.
2. The Commissioner of Income-tax (Appeals) - 4, Mumbai (hereinafter referred to as the CIT(A)) erred in upholding the action of the Assessing Officer in upholding the action of the Assessing Officer in making an addition of a sum of Rs.17,00,00,000 being amounts received as share application money on the ground that the appellants failed to prove the nature and genuineness of the share capital and creditworthiness of the share applicants thereby treating the said sums as unexplained cash credit under section 68 of the Act.

The appellants contend that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have upheld the action of the Assessing Officer in making the impugned addition inasmuch as the monies do not belong to the appellants and the provisions of section 68 are not applicable to the facts of the case.

3. The CIT(A) erred in upholding the action of the Assessing Officer in treating business loss of Rs.9,09,65,476 as speculation loss by invoking the provisions of Explanation to section 73.

The appellants contend that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have upheld the action of the Assessing Officer inasmuch as the Assessing Officer has fallen in error in treating the business loss as speculation loss by invoking the provisions of Explanation to section 73.

4. The CIT(A) erred in upholding the action of the Assessing Officer in charging interest Rs.5,64,279, Rs 4,06,28,111 and Rs.3,23,607 under sections 234A, 234B and 234D of the Act.

The appellants contend that the CIT(A) ought not to have upheld the action of Assessing Officer in charging interest under sections 234A, 234B and 234D inasmuch as -

- (a) the Assessing Officer has not given an opportunity to the appellants before charging the said interest as required by the principles of nature justice,
- (b) the charging of interest is not in accordance with law.

The appellants crave leave to add to, alter and/or amend the aforesaid grounds of appeal."

2. Briefly stated, the assessee company which is engaged in the business of trading and investment in shares and derivatives had e-filed its return of income for A.Y 2009-10 on 30.09.2009, declaring an income of Rs.nil (after claiming loss of Rs.9,23,62,408/-). Original assessment was framed by the A.O vide his order passed u/s 143(3) of the Act, dated 29.12.2011.

3. Subsequently, the case of the assessee was reopened by the A.O u/s 147 of the Act, for the reason that share premium of Rs.15.30 crore received by the assessee had remained unexplained in light of the decision of the Hon'ble High court of Bombay in the case of Major Metal Ltd. Vs. U.O.I & Ors (2013) 359 ITR 450 (Bom). Notice u/s 148 dated 25.03.2014 was issued and duly served on the assessee. In compliance, it was submitted by the assessee that its original return of income filed on 30.09.2009 may be treated as a return filed in response

to the aforesaid notice. The request of the assessee was accepted by the A.O who thereafter issued notice u/s 143(2), dated 11.09.2014. Also, the A.O vide his letter dated 23.07.2014 made available to the assessee a copy of the reasons to believe on the basis of which its case was reopened under Sec. 147 of the Act. As the assessee had failed to comply with the notices that were issued to him U/ss. 143(2)/142(1) of the Act, therefore, the A.O was constrained to proceed with and frame the assessment u/s 144 of the Act. However, the assessee at the fag end of the assessment proceedings i.e on 13.03.2015 had filed with the A.O its written submissions.

4. On a perusal of the financial statements it was observed by the A.O that the assessee had claimed to have received an amount of Rs.15.30 crores as share premium during the year under consideration from the following 4 companies:

- “(a) M/s Jay Investtrade Private Ltd.
- (b) M/s Shanti Financial Services Private Ltd.
- (c) M/s HSM Financial Services Private Ltd.
- (d) M/s Kundan Leasing and Finvest Private Ltd.”

It was observed by the A.O that the assessee company had claimed to have allotted shares to the aforementioned share subscribers, as under:

Sr. No.	Name of the share subscribers	Address of the Share Subscribers	Number of shares Allotted	Amount received as share application money (in Rs.)
1	M/s Jay Investtrade Private Ltd.	21, Modi Street, Achal Building, 3 rd Floor, Fort, Mumbai 400001	1,30,000	1,30,00,000/-
2	M/s Shanti Financial Services Private Ltd.	21, Modi Street, Achal Building, 3 rd Floor, Fort, Mumbai 400001	8,00,000	8,00,00,000/-
3	M/s HSM Financial Services Private	21, Modi Street, Achal Building, 3 rd Floor, Fort,	2,00,000	2,00,00,000/-

	Ltd.	Mumbai 400001		
4	M/s Kundan Leasing and Finvest Private Ltd.	21, Modi Street, Achal Building, 3 rd Floor, Fort, Mumbai 400001	5,70,000/-	5,70,00,000/-
Total				17,00,00,000/-

It was noticed by the A.O that not only the address of the assessee and the aforementioned share subscribers was the same, but even some of the directors in the aforesaid companies were common. It was further observed by the A.O that as per the 'Notes' to the financial statements the assessee company was restrained from accessing the securities market and was prohibited by SEBI from directly or indirectly buying/selling or dealing in securities market. On a further perusal of the records, it was gathered by the A.O that SEBI vide its order passed under Sec. 11 and 11B of the Securities and Exchange Board of India Act, 1992, dated June 4th, 2009 in the case of the Venture Business Advisors Pvt. Ltd. (VBAPL) had held, that the assessee and all the companies to whom the assessee had claimed to have allotted shares had indulged into fraudulent and deceptive practice of creating false and misleading appearance of share transactions in market and off market routes. It was further observed by the A.O that by another order dated August 20, 2014 the SEBI had restrained VBAPL for a period of 10 years. In the backdrop of the aforesaid facts, it was observed by the A.O that the assessee as well as the other companies to whom shares were claimed to have been allotted were involved in dubious trade practices and there was a clear linkage between these companies with the purpose of making false transactions. It was further noticed by the A.O that a perusal of the investment schedule of the assessee company revealed that it had invested in the companies from which it had received money for share application. Also, it was observed by him that the investment schedule of the other companies revealed that they too had made investments in each other as well as in the assessee company. The aforesaid factual position was culled out by the A.O in the assessment order as under:

Sr. No.	Name of the company	No. of shares	Amount invested (in Rs.)
1.	Chandra Financial Services Pvt. Ltd.	93500 preference shares of Shanti Financial Services P. Ltd.	9,25,00,000/-
		576000 preference shares of Jay Investrade P. Ltd.	5,76,00,000
2.	Jay Investrade P. Ltd.	130000 preference shares of Chandra Financial Services P. Ltd.	1,30,00,000/-
		50000 preference shares of Shanti Financial Services Pvt. Ltd.	50,00,000/-
3.	Shanti Financial Services Pvt. Ltd.	8,00,000 preference shares of Chandra Financial Services P. Ltd.	8,00,00,000/-
		1,50,000 preference shares of Jay Investrade P. Ltd.	1,50,00,000/-

Backed by his aforesaid observations the A.O was of the view that there was a circular flow of money in the form of investments wherein the same company was investing in and allotting its preference shares to other companies. Apart from the aforesaid, it was gathered by the A.O that all the aforementioned companies (including the assessee company) had suffered huge losses during the year under consideration, as under:

Sr. No.	Name of the company	Returned income for A.Y. 2009-10 (In Rs.)
1	Chandra Financial Services P. Ltd.	Loss of Rs. 9,23,62,408/-
2	Jay Investrade Pvt. Ltd.	Loss of Rs.3,41,58,259/-
3	Shanti Financial Services Pvt. Ltd.	Loss of Rs.3,24,28,420/-
4	HSM Financial Services Pvt. Ltd.	Loss of Rs.15,67,30,248/-

In the backdrop of the aforesaid facts, the A.O held a conviction that now when the aforementioned companies were incurring huge losses, therefore, it could safely be gathered that they were in no financial position to pay such huge share capital/premium to the assessee which itself was a huge loss making company. It was also noticed by the A.O that the assessee had not supported the high share premium received from the aforesaid share allottees on the basis of any valuation report. Also, it was observed by the A.O that the assessee company despite specific directions had not submitted a copy of the board resolution to support its

aforesaid transactions. In the totality of the aforesaid facts, the A.O drawing support from the judgment of the Hon'ble High Court of Bombay in the case of Major Metals Ltd. Vs. U.O.I & Ors (2013) 359 ITR 450 (Bom) concluded that the ratio laid down by the Hon'ble High Court in its aforesaid judgment squarely covered the facts and circumstances of the case of the assessee before him. On the basis of the aforesaid facts, the A.O was of the view that the assessee had failed to provide any credible evidence in support of the nature and genuineness of the share capital and creditworthiness of the share applicants. Also, the A.O observed that the assessee could not substantiate the huge premium that was charged on the shares allotted to the aforementioned companies. It was observed by the A.O that the cross-investments between the assessee and the so called investor companies to whom shares were claimed to have been allotted further supported the ingenuineness of the transactions in question. Backed by the aforesaid facts the A.O stamped the receipt of share capital and share premium of Rs.17 crores as an unexplained credit u/s 68 of the Act.

5. Observing, that as per the order of SEBI U/ss. 11 and 11B of the Securities and Exchange Board of India Act, 1992, dated June 4th, 2009 (later confirmed vide order dated June 20th, 2010) as the assessee was engaged in manipulative circular trading which was in clear violation of the SEBI Act, 1992 r.w. Regulation 11 of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003, therefore, as per the A.O its claim of non-genuine and unlawful business loss and set-off/carry forward of the same was to be disallowed. Alternatively, the A.O was of the view that as the business loss shown by the assessee was from trading of shares of other companies, therefore, as per 'Explanation' to Sec. 73 of the Act the same being in the nature of a speculation loss was not eligible for set-off against the other heads of income. Accordingly, in the backdrop of his aforesaid

observations the A.O vide his order passed u/s 144 r.w.s 147, dated 20.03.2015 assessed the income of the assessee company at Rs.17 crores.

6. Aggrieved, the assessee carried the matter in appeal before the CIT(A). Observing, that there was circular flow of money amongst the assessee and the other companies to whom shares were claimed to have been allotted; and that the said share subscribers had no financial capacity to make the investments in question, the CIT(A) was not inclined to accept the assessee's claim of having carried out genuine transactions of receipt of share capital/premium from the aforesaid companies. Also, it was observed by the CIT(A) that the assessee despite specific directions had neither filed the valuation report in support of its claim of having received huge share premium from the allottees of the shares nor filed a copy of the board resolution authorizing the same. Backed by his aforesaid observations the CIT(A) upheld the addition of Rs.17 crores made by the A.O. Also, the CIT(A) finding no infirmity in the disallowance of the assessee's claim of loss of Rs.9,09,65,476/- by treating the same as a speculation loss by the A.O upheld the same. Accordingly, the CIT(A) dismissed the appeal filed by the assessee.

7. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The Id. Authorized Representative (for short 'A.R') for the assessee at the very outset took us though the copy of the reasons to believe on the basis of which the case of the assessee was reopened u/s 147 of the Act. It was submitted by the Id. A.R that a bare perusal of the reasons to believe revealed that the case of the assessee was reopened without any fresh material/information coming to the notice of the assessing officer on the basis of which he could have formed a bonafide belief that any income of the assessee chargeable to tax had escaped assessment. It was the claim of the Id. A.R that the case of the assessee company was reopened de hors any material available on record which would have formed the genesis for formation of a belief by the

A.O that the assessee's income chargeable to tax had escaped assessment. Apart from that, it was submitted by the Id. A.R that even otherwise the A.O had embarked upon the reassessment proceedings only on the basis of a change of opinion as against that as was arrived at by his predecessor while framing the original assessment. Elaborating on his aforesaid contention, it was submitted by the Id. A.R that the issue pertaining to receipt of share premium by the assessee company which had formed the very basis for reopening of the assessee's case was duly considered by the A.O in the course of the original assessment proceedings which had culminated into an order under Sec. 143(3), dated 29.12.2011. In order to fortify his aforesaid contention the Id. A.R had drawn our attention to the "Annexure" to notice u/s 142(1), dated 10.02.2011, wherein at Serial No. 17 and Serial No. 20 the A.O had, inter alia, raised queries pertaining to the increase in share capital a/w details as regards the names and addresses of the shareholders who were having more than 10% of shares and their shareholding pattern, income tax credentials etc. Our attention was drawn by the Id. A.R to the reply dated 02.11.2011 that was filed by the assessee in compliance to the aforesaid notice issued u/s 142(1) of the Act, wherein at Serial Nos. 9 & 11 the assessee had furnished an 'Explanatory note' as regards the increase in share capital a/w the details as regards the shareholders. Backed by his aforesaid contentions the Id. A.R had assailed the validity of the reopening of the concluded assessment of the assessee company for two fold reasons, viz. (i) that the case of the assessee was reopened in the absence of any material/information on the basis of which the A.O could have formed a bonafide belief that the income of the assessee chargeable to tax had escaped assessment; and (ii) that the reopening of the assessee's case was even otherwise not sustainable as the same was merely backed by a change of opinion of the A.O as against that as was held by his predecessor while framing the regular assessment vide order passed u/s 143(3), dated 29.12.2011 qua the issue of receipt of share premium by the assessee company.

8. Per contra, the Id. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities. It was submitted by the Id. D.R that as the aforesaid issue was not raised by the assessee before the lower authorities, therefore, in the absence of any bonafide reasons it could not be now permitted to raise the same for the very first time in the course of the present appellate proceedings. Reliance in support of his aforesaid contention was placed by the Id. D.R on the judgment of the Hon'ble High Court of Madras in the case of Hanon Automotive Systems India (P) Ltd. Vs. DCIT, Circle -2(2) (2019) 101 taxmann.com 514 (Mad) and that of the Hon'ble High Court of Bombay in the case of CIT Vs. Pruthvi Brokers & Shareholders (2012) 23 taxmann.com 23 (Bom). Alternatively, it was submitted by the Id. D.R that no infirmity could be related to the reasons to believe on the basis of which the A.O had assumed jurisdiction for reopening the case of the assessee. It was submitted by the Id. D.R that as the share premium of Rs.15.30 crores received by the assessee company had remained unexplained, therefore, the A.O by drawing support from the judgment of the Hon'ble High Court of Bombay in the case of Major Metals Ltd. Vs. UOI 207 taxman.com 185 (Bom) had validly reopened its case u/s 147 of the Act. On merits, the Id. D.R relied on the orders of the lower authorities and supported their observations by drawing support from the judgment of the Hon'ble Supreme Court in the case of PCIT(Central) -1 Vs. NRA Iron & Steel (P) Ltd. (2018) 103 taxmann.com 48 (SC).

9. We have heard the Id. Authorized Representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by them in support of their respective contentions. As the assessee has assailed the validity of the jurisdiction assumed by the A.O for reopening of its case u/s 147 of the Act, therefore, we shall first deal with the same. Before us, it is the claim of the Id. D.R that as the assessee had not objected to the validity of

the jurisdiction assumed by the A.O u/s 147 of the Act before the lower authorities, therefore, it could not be permitted to now raise the same for the very first time in the course of the present appellate proceedings. Insofar the aforesaid objection of the Id. D.R is concerned, we are unable to persuade ourselves to accept the same. As noticed by us hereinabove, the Id. D.R in order to drive home his claim that the assessee having not challenged the validity of the jurisdiction assumed by the A.O u/s 147 of the Act, thus, could not be allowed to raise its objection qua the same in the course of the appellate proceedings had relied on the judgment of the Hon'ble High Court of Madras in the case of Hanon Automotive Systems India (P.) Ltd. Vs. DCIT, Circle-2(2) (2019) 101 taxmann.com 514 (Madras). In our considered view, the support drawn by the Id. D.R on the aforesaid judicial pronouncement is misconceived and in fact misplaced in context of the facts involved in the case of the assessee before us. On a perusal of the aforesaid judgment, we find that the issue before the Hon'ble High Court was as to whether or not the assessee without raising its objections before the lower authorities to the reasons to believe on the basis of which its case had been reopened could be permitted to question the reopening of its case by filing a writ petition before the Hon'ble High Court ? Answering the said issue, it was observed by the Hon'ble High Court that as the assessee had not raised objections before the A.O qua the reasons on the basis of which its case was reopened u/s 147, it would, thus, not be entitled to question the said reopening by filing a writ petition. In the backdrop of the aforesaid facts and the issue involved in the aforesaid case before the Hon'ble High Court, we are of the considered view that the same in no way can be construed as laying down a broad proposition, as canvassed by the Ld. D.R, that an assessee cannot be allowed to assail the validity of the reassessment proceedings for the very first time in the course of the appellate proceedings. On the contrary, we are of the considered view that as the adjudication of the assessee's claim that the A.O had wrongly assumed jurisdiction and framed the assessment u/s 147 of the Act is

based on the facts available on record, therefore, we find no reason as to why the same cannot be raised, though, for the first time in the course of the proceedings before us. Our aforesaid view is fortified by the judgment of the Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. Vs. CIT (1998) 229 ITR 383 (SC). Also support is drawn from the judgment of the Hon'ble High Court of Bombay in the case of CIT, Central 1, Mumbai Vs. Pruthvi Brokers and Shareholders (2012) 23 taxmann.com 23 (Bom). In its aforesaid order, the Hon'ble High Court had observed that as an assessee is entitled to raise the additional ground not merely in terms of legal submissions, but also additional claims not made in the return filed by it. Backed by the aforesaid position of law, we are unable to persuade ourselves to subscribe to the claim of the Id. D.R that the assessee's challenge to the validity of the jurisdiction assumed by the A.O u/s 147 of the Act does not merit admission.


10. We shall now advert to the maintainability of the claim of the Id. A.R that the A.O had traversed beyond his jurisdiction and had invalidly assumed jurisdiction and reopened the case of the assessee company u/s 147 of the Act. Before advertng any further, we deem it fit to cull out the reasons to believe on the basis of which the case of the assessee company was reopened by the A.O u/s 147 of the Act, which reads as under:

"During the year, the assessee has received an amount of Rs. 15,30,00,000/- as share premium. The nature of this share premium remains unexplained in the light of the decision of the Hon'ble Bombay High Court in the case of Major Metals Ltd. Vs UOI 207 Taxman 185(Bom).

In view of the above, I have reason to believe that income chargeable to tax has escaped assessment for A.Y. 2009-10 within the meaning of Section 147 of the I.T. Act. Accordingly, the assessment for A. Y. 2009-10 is reopened u/s 147 by issue of notice u/s 148 of the I. T. Act, 1961."



Yours sincerely,


(Satyam Srivastava)
ACIT - Circle 2(1), Mumbai

As is discernible from the aforesaid, the case of the assessee was reopened by the A.O, for the reason, that as per him the share premium of Rs.15.30 crores received by the assessee had remained unexplained in light of the decision of the Hon'ble High Court of Bombay in the case of Major Metals Ltd. vs. UOI 207 taxman.com 185 (Bom). However, we find that there is no whisper by the A.O in the reasons of any such material and/or information that had formed a basis for him to arrive at a bonafide belief that the share premium received by the assessee company had remained unexplained. In our considered view, as per the mandate of law, the A.O for reopening of a concluded assessment is required to have before him reasons which had formed a basis for him to arrive at a bonafide belief that the income of the assessee chargeable to tax for the year under consideration had escaped assessment. Our aforesaid view is fortified by the judgment of the Hon'ble Apex Court in the case of ACIT Vs. Rejesh Jhaveri Stock Brokers Pvt. Ltd. (2007) 291 ITR 500 (SC). In its aforesaid order, it was, inter alia, observed by the Hon'ble Apex Court that a notice for reopening of an assessment u/s 147 of the Act could only be justified if the A.O has reasons to believe that the income of the assessee chargeable to tax had escaped assessment. On a perusal of the aforesaid reasons to believe on the basis of which the concluded assessment of the assessee before us had been reopened, we find that the same do not indicate any basis for forming of a belief by the A.O that the share premium received by the assessee company was unexplained and, thus, the income of the assessee chargeable to tax had escaped assessment. In the backdrop of the aforesaid facts, we are of a strong conviction that in the absence of any tangible material before the A.O to come to a conclusion that the income of the assessee chargeable to tax had escaped assessment, there was no justification on his part to have reopened the case of the assessee u/s 147 of the Act. Backed by our aforesaid observations, we are of the considered view that de hors any tangible material and/or information which could have formed a basis for the A.O to form a bonafide belief that the income

of the assessee chargeable to tax had escaped assessment, the concluded assessment of the assessee could not have been validly reopened by him u/s 147 of the Act.

11. Alternatively, we also find substantial force in the contention of the Id. A.R that the entire exercise for reopening the concluded assessment of the assessee was embarked upon by the A.O not on the basis of any fresh tangible material or any new information which had come to his notice subsequent to the culmination of the original assessment proceedings, but on the basis of the same set of facts as were there before his predecessor while framing of the original assessment under Sec. 143(3), dated 29.12.2011. On a perusal of the reasons to believe, we find that the case of the assessee company was reopened for the reason that the share premium received by it had remained unexplained in light of the decision of the Hon'ble High Court of Bombay in the case of Major Metals Ltd (supra). As stated by the Id. A.R, and rightly so, the issue pertaining to receipt of share premium by the assessee company had specifically been adverted to by the A.O while framing the original assessment vide his order passed u/s 143(3) dated 29.12.2011. As noticed by us hereinabove, the A.O vide his notice issued u/s 142(1), dated 10.02.2011 had specifically raised queries as regards the increase in the share capital; and had also called for the names and addresses of the shareholders who were having more than 10% of shares in the assessee company a/w their shareholding and PAN numbers. Also, the A.O had categorically directed the assessee to furnish the details of additions to share capital a/w names and addresses of the parties concerned. In reply, we find that the assessee company had vide its letter dated 2nd November, 2011, furnished the requisite details of the shareholders a/w an explanatory note pertaining to the increase in share capital during the year under consideration. In the backdrop of the aforesaid facts, we are of the considered view that the A.O while framing the regular assessment u/s 143(3), dated 29.12.2011 had consciously formed an

opinion that the additions to the share capital of the assessee company was in order. Backed by the aforesaid facts, we find substance in the claim of the Id. A.R that the reassessment proceedings had been initiated by the A.O not on the basis of any fresh tangible material or any new information which had come to his notice subsequent to the culmination of the original assessment proceedings, but on the basis of the same set of facts as were there before his predecessor at the time of framing of the regular assessment u/s 143(3) dated 29.12.2011. On a careful perusal of the reasons recorded by the A.O, we are of a strong conviction that in the garb of reopening the case of the assessee he had on the basis of the same set of facts as were available on record and had been deliberated upon by his predecessor at the time of framing of the original assessment tried to substitute his view as against that of his predecessor. In fact, we are unable to comprehend as to what new 'material' or 'information' had come to the notice of the A.O after the framing of the original assessment, which would have justified the reopening of its case. As can safely be gathered from a perusal of the reasons to believe, we are of the considered view that the A.O holding a conviction that his predecessor while framing the regular assessment was in error in accepting the share premium received by the assessee company, which as per him was unexplained, had thus with the sole objective of substituting his view as against that of his predecessor, therein, sought to reopen the case of the assessee company. We are afraid that such a substitution of a view of a successor A.O cannot form a justifiable basis for reopening the case of an assessee. Our aforesaid view is fortified by the judgment of the **Hon'ble Supreme Court** in the case of **CIT Vs. Kelvinator of India (2010) 320 ITR 561 (SC)**, wherein the Hon'ble Apex Court had observed that merely on the basis of a 'change of opinion' the case of an assessee cannot be reopened and had held as under:-

“On going through the changes, quoted above, made to s. 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, reopening could be done

under above two conditions and fulfilment of the said conditions alone conferred jurisdiction on the AO to make a back assessment, but in s. 147 of the Act (w.e.f. 1st April, 1989), they are given a go by and only one condition has remained, viz., that where the AO has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post 1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, s. 147 would give arbitrary powers to the AO to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The AO has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the AO. Hence, after 1st April, 1989, AO has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to s. 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in s. 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the AO. We quote hereinbelow the relevant portion of Circular No. 549, dt. 31st Oct., 1989 [(1990) 82 CTR (St) 1], which reads as follows :

"7.2 Amendment made by the Amending Act, 1989, to re-introduce the expression 'reason to believe' in s. 147.—A number of representations were received against the omission of the words 'reason to believe' from s. 147 and their substitution by the 'opinion' of the AO. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of Court rulings in the past and was well settled and its omission from s. 147 would give arbitrary powers to the AO to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended s. 147 to reintroduce the expression 'has reason to believe' in place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new s. 147, however, remain the same."

Further, following the judgment of the 'Full bench' of the Hon'ble High Court of Delhi in the case of Kelvinator of India (supra), which had been upheld by the Hon'ble Apex Court, the **Hon'ble High Court of Bombay** in the case of **Asteroids Trading & Investment P. Ltd. Vs. DCIT (2009) 308 ITR 190 (Bom)**, had held, that an A.O is precluded from assuming jurisdiction to initiate

reassessment proceedings on the basis of a 'Change of opinion', observing as under:

“8. Perusal of the record shows that the petitioner had made full disclosure necessary for claiming deduction under s. 80M. The AO after applying his mind to the relevant records had made a specific order allowing the deduction. A perusal of the record shows that now respondent No. 1 proposes to reopen the assessment because according to him deduction under s. 80M was wrongly allowed, and, therefore, he was of the opinion that the income has escaped assessment. Though, in the notice respondent No. 1 has used the phrase "reason to believe", admittedly between the date of the order of assessment sought to be reopened and the date of forming of opinion by respondent No. 1, nothing new has happened and there is no change of law, no new material has come on record, no information has been received. It is merely a fresh application of mind by the same officer to the same set of facts. Thus, it is a case of mere change of opinion, which, in our opinion, does not provide jurisdiction to respondent No. 1 to initiate proceedings under s. 148 of the Act. It can now be taken as a settled law, because of a series of judgments of various High Courts and the Supreme Court, which have been referred to in the judgment of the Full Bench of the Delhi High Court in the case of Kelvinator of India Ltd. (supra) referred to above, that under s. 147 assessment cannot be reopened on a mere change of opinion.”

We further find that the **Hon'ble High Court of Bombay** in the case of **Asian Paints Ltd. Vs. DCIT (2008) 308 ITR 195 (Bom)**, had observed, that as no new information/material was received by the A.O, therefore, the fresh application of mind by him to the same set of facts and material which were available on record at the time of framing of the assessment but had inadvertently remained omitted to be considered would tantamount to review of order, which is not permissible as per law. The Hon'ble High Court while concluding as hereinabove had held as under:-

“10. It is further to be seen that the legislature has not conferred power on the AO to review its own order. Therefore, the power under s. 147 cannot be used to review the order. In the present case, though the AO has used the phrase "reason to believe", admittedly between the date of the order of assessment sought to be reopened and the date of formation of opinion by the AO, nothing new has happened, therefore, no new material has come on record, no new information has been received; it is merely a fresh application of mind by the same AO to the same set of facts and the reason that has been given is that the some material which was available on record while assessment order was made was inadvertently excluded from consideration. This will, in our opinion, amount to opening of the assessment merely because there is change of opinion. The Full Bench of the Delhi High Court in its judgment in the case of Kelvinator (supra)

referred to above, has taken a clear view that reopening of assessment under s. 147 merely because there is a change of opinion cannot be allowed. In our opinion, therefore, in the present case also, it was not permissible for respondent No. 1 to issue notice under s. 148”.

Further, the **Hon’ble High Court of Bombay** in the case of **ICICI Prudential Life Insurance Co. Ltd. Vs. ACIT (2010) 325 ITR 471 (Bom)**, relying on the judgment of the Hon’ble Supreme Court in the case of *Kelvinator of India (supra)*, had held as under:

23. *Though the power to reopen an assessment within a period of four years of the expiry of the relevant assessment year is wide, it is still structured by the existence of a reason to believe that income chargeable to tax has escaped assessment. The Supreme Court, in a recent judgment in Kelvinator of India Ltd. (supra) while drawing upon the legislative history of s. 147 held that the expression ‘reason to believe’ needs to be given a schematic interpretation in order to ensure against an arbitrary exercise of power by the AO. The judgment of the Supreme Court emphasises that the power to reopen an assessment is not akin to a power to review the order of assessment and a mere change of opinion would not justify a recourse to the power under s. 147. Unless the AO has tangible material to reopen an assessment, the power cannot be held to be validly exercised. The Supreme Court has held thus :*

“...Therefore, post-1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words ‘reason to believe’ failing which we are afraid s. 147 would give arbitrary powers to the AO to reopen assessments on the basis of ‘mere change of opinion’, which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The AO has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain precondition and if the concept of ‘change of opinion’ is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of ‘change of opinion’ as an inbuilt test to check abuse of power by the AO. Hence, after 1st April, 1989, AO has power to reopen, provided there is ‘tangible material’ to come to the conclusion that there is escapement of income from assessment. Reasons must have a link with the formation of the belief.”

24. *In the present case, for all the assessment years in question, and a fortiori for asst. yr. 2004-05, what the AO has purported to do is to reopen the assessment on the basis of a mere change of opinion. That the AO had no tangible material is evident from the circumstance that the reasons which have been disclosed contain a reference to the same basis, namely the existence of a nil surplus/deficit in Form 1 which was drawn to the attention of and was present to the mind of the AO during the assessment proceedings under s. 143(3).*

Consequently, it is evident that there is an absence of tangible material before the AO”.

Also, the Hon’ble High Court of jurisdiction in the case of **Aventis Pharma Ltd. Vs. Asst. CIT (2010) 323 ITR 570 (Bom)**, reiterating its aforesaid view that reassessment proceedings cannot be permitted on the basis of a ‘Change of opinion’ had held as under:-

“There is merit in the submission which has been urged on behalf of the assessee that there was no tangible material before the AO on the basis of which the assessment could have been reopened and what is sought to be done is to propose a reassessment on the basis of a mere change of opinion. This, in view of the settled position of law is impermissible. No tangible material is shown on the basis of which the assessment is sought to be reopened. In the absence of tangible material, what the AO has done while reopening the assessment is only to change the opinion which was formed earlier on the allowability of the deduction. The power to reopen an assessment is conditional on the formation of a reason to believe that income chargeable to tax has escaped assessment. The power is not akin to a review. The existence of tangible material is necessary to ensure against an arbitrary exercise of power. There is no tangible material in the present case.

12. At this stage, we may herein observe, that as per the mandate of law, even where a concluded assessment is sought to be reopened by the A.O within a period of 4 years from the end of the relevant assessment year, it is must that the A.O has fresh material or information with him that had led to the formation of belief on his part that the income of the assessee chargeable to tax has escaped assessment. Our aforesaid view is fortified by the judgments of the **Hon’ble High Court of Bombay** in the case of **NYK Lime (India) Ltd. Vs. DCIT (No.2) [2012] 346 ITR 361 (Bom)** and **Purity Tech Textile Pvt. Ltd. Vs. ACIT & Anr. [2010] 325 ITR 459 (Bom)**. Backed by the aforesaid settled position of law, we are of the considered view that as the A.O for the reasons discussed at length hereinabove had wrongly assumed jurisdiction and reopened the concluded assessment of the assessee company without satisfying the mandate of law as required u/s 417 of the Act, therefore, the assessment framed by him vide his order passed u/s 144 r.w.s 147, dated 20.03.2015 cannot be sustained and is

liable to be struck down. Resultantly, the **Ground of appeal No. 1** is allowed in terms of our aforesaid observations.

13. That as we have quashed the assessment for want of jurisdiction, therefore, we refrain from advertng to and therein adjudicating upon the merits of the case which are left open. The **Grounds of appeal Nos. 2 to 4** are disposed off in terms of our aforesaid observations.

14. Resultantly, the appeal of the assessee is allowed in terms of our aforesaid observations.

Order pronounced in the open court on 18.11.2021

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Sd/-
(Ravish Sood)
JUDICIAL MEMBER

Mumbai;

Dated: 18.11.2021

PS: Rohit

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,
//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai